Supreme Court
FILED
APR 28 1900
JAMES H. McKENNEY,
Clerk

6947. Box 48

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

Guarantee Company of North America

v.

Mechanics' Savings Bank & Trust Co.,

For the use of J. J. Pryor, Assignee.

PETITION OF THE GUARANTEE COMPANY OF NORTH AMERICA FOR WRIT OF CERTIORARI

Requiring the Circuit Court of Appeals for the Sixth Circuit to Certify the Case to the Supreme Court, for its Review and Determination.

WM. L. CRANBERY,
COUNSEL.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

Guarantee Company of North America

v.

Mechanics' Savings Bank & Trust Co.,

For the use of J. J. PRYOR, Assignee.

PETITION FOR WRIT OF CERTIORARI

REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE GUARANTEE COMPANY OF NORTH AMERICA, APPELLANT, V. THE MECHANICS' SAVINGS BANK & TRUST COMPANY, FOR THE USE OF J. J. PRYOR, ASSIGNEE, APPELLEE.

To the Honorable the Supreme Court of the United States:

Your petitioner, the Guarantee Company of North America, respectfully shows to this Honorable Court as follows:

Your petitioner is, and has been since 1872, a corporation chartered and organized under the laws of the Dominion of Canada, engaged, under authority of its charter, in the business of guaranteeing the fidelity of persons in positions of trust. The Mechanics' Savings Bank and Trust Company was, in the year 1888 and prior thereto, a corporation, chartered and organized under the general laws of the State of Tennessee, engaged, under

the authority of its charter, in the business of a bank of deposit and discount and in accepting and executing various trusts, having a capital of $50,000.

Among its other officials and employees, required in the conduct of its corporate business, was one John Schardt, who was its teller and collector from January 16, 1888, to January 1, 1893, and its cashier from January 1, 1893, to April 17, 1893. On January 16, 1888, in consideration of the payment of a premium of $100.00, petitioner entered into a contract with the Mechanics' Savings Bank and Trust Company, being bond No. 93,525, in the penalty of $10,000, agreeing to make good and reimburse to it such pecuniary loss as it should sustain by the fraudulent acts of John Schardt in connection with the duties of his office of teller and collector for a term of one year thereafter. In the bond evidencing the contract, it was stipulated, among other things:

"The following provisions are also to be observed and binding as a part of this bond:

. . . . . .

"That the employer (meaning said Mechanics' Savings Bank and Trust Company) shall observe or cause to be observed all due and customary supervision over the said employee (meaning said Schardt), for the prevention of default.

. . . . . .

"That the employer shall at once notify the Company of his becoming aware of the said employee being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits.

"That there shall be an inspection or audit of the accounts or books of the employee on behalf of the employer at least once in every twelve months from the date of this bond."

The bond so entered into was renewed from year to year, until January 1, 1893, but at no time until the Mechanics' Savings Bank and Trust Company had certified that the accounts of said Schardt, for the year just ended, had been examined and verified.

The said employer ceased to observe, or cause to be observed, due and customary supervision over the said Schardt for the pre-

vention of default, and, on September 12, 1890, he began to default, by embezzling the funds of his employer. He continued his default, and embezzled by constant and continued abstractions, amounts as follows: From September 12, 1890, to January 16, 1891, $5,879.34; from January 16, 1891, to January 1, 1892, $22,290; from January 1, 1892, to January 1, 1893, $50,649.90. The amounts so embezzled he lost in speculations on stocks, grain, cotton, and other commodities.

In the summer or fall of 1892, one Kyle, of New York, representing Myers & Company, of that city, came to Nashville, and proposed to Charles Sykes, then cashier of the Mechanics' Savings Bank and Trust Company, to become interested in the "brokerage" business, and to represent Myers & Company at Nashville. Cashier Sykes replied that he did not like the idea, because it was a purely speculative business. Mr. Kyle then said that that made no difference, that the teller of the Bank, John Schardt, was a part owner in a similar concern. Cashier Sykes at once told Lewis T. Baxter, the President of the Mechanics' Savings Bank and Trust Company, of the conversation. The next day he told John Schardt of what Mr. Kyle had said. Said Schardt then admitted to said Sykes that he had at one time been interested in such a concern, but said he had sold his interest. In this same conversation he admitted to Cashier Sykes that he had speculated to some extent, but had made money on every transaction, and had seen the error of his way and ceased to do so any more. Cashier Sykes immediately told President Baxter of what said Schardt had said.

Some time thereafter, Cashier Sykes received an anonymous letter telling him that Schardt had been speculating. He showed it to President Baxter, but he said not to pay any attention to it. Cashier Sykes spoke to said Schardt about it. Said Schardt said that he thought that he knew the author, and asked that he be given the letter, and said that he would bring the party before Mr. Sykes, and make him acknowledge that it was false. Mr. Sykes

gave him the letter, and asked him about it several times. Said Schardt always replied that he was working on the matter. Mr. Sykes told President Baxter of these conversations.

At some time before January 1, 1893, Mr. J. M. Eatherly, a stockholder, director, and chairman of the finance committee of the Mechanics' Savings Bank and Trust Company, saw a letter to the effect that Schardt was a partner in a "bucket shop," directed to John Woodard, another director. When Woodard showed it to him, said Eatherly asked permission to call Mr. Schardt up and show it to him, and said that there was a communication that he wanted him to read. Said Schardt read the letter, and remarked, "It's a lie, and I can prove it." Mr. Eatherly told Mr. Schardt that it devolved on him to prove it false. Mr. Schardt immediately went out, and returned with one Frank Searight and a Dr. Barry. President Baxter, Woodard, and Eatherly went to the rear of the Bank building with Schardt and Messrs. Searight and Barry. In this conference, Mr. Searight said that at some time before, Mr. Schardt, Dr. Barry, and himself, had agreed to open a "brokerage association," each contributing $200 to its capital. For some reason Mr. Schardt became dissatisfied in a short time, and sold his interest to Mr. Searight.

Subsequent to that conversation, and before January 1, 1893, Mr. Eatherly again heard that Schardt was speculating. He went to Schardt's house to see him about it, and told him what he had heard. Schardt said it was not so, that he did not own any stocks at all, having sold everything he had. Mr. Eatherly told him that if he was speculating, he ought to quit that or quit the Bank.

Petitioner had caused to be inserted in the bond of suretyship the condition referred to, providing that the employer should at once notify petitioner on its becoming aware of the said employee being engaged in speculation or gambling, for the reason that petitioner declines to become, or remain, the surety of any person

in a fiduciary position who speculates, since petitioner has found, by long experience, that such a person can not be safely trusted. Had the Mechanics' Savings Bank and Trust Company notified petitioner of the facts so made known to it through its president, its cashier, and two of its directors, and a member of its finance committee, petitioner would have at once retired from said bond and canceled the same. When such information did in fact come to petitioner through other sources, in April, 1893, petitioner immediately canceled another bond it had issued to the Mechanics' Savings Bank and Trust Company, guaranteeing the fidelity of said John Schardt in the position of cashier.

But the Mechanics' Savings Bank and Trust Company wholly failed to comply with its undertaking in said bond, and did not notify petitioner of its becoming aware of said Schardt being engaged in speculation, as hereinbefore set out. On becoming aware thereof, it did not dismiss said Schardt from its employ, nor did it cause his accounts to be examined. Such examination would have immediately disclosed his large embezzlements, lost in the speculations he admitted himself to have been engaged in. On the contrary, it retained him in its employ, and, on January 1, 1893, promoted him by election to be its cashier.

Thereupon, the Mechanics' Savings Bank and Trust Company made application to petitioner to become the surety of said John Schardt, in the sum of $20,000, in his new position of cashier. For the purpose of determining whether or not it would become such surety, and before it would consent thereto, petitioner required Lewis T. Baxter, president of said Mechanics' Savings Bank and Trust Company, to make in its application for such bond, written answers to certain material questions. Among other such questions regarding said Schardt, and answers thereto, were the following:

"Have you ever known or heard anything unfavorable as to his habits, past or present?

"No.

"Or of any matters concerning him about which you deem it advisable for the Company to make inquiry?

"No.

"When were applicant's (Schardt) books and accounts (including cash, securities, and vouchers, if any), last examined, and by whom?

"*Answer* — December 31, 1892, by finance committee (were they found correct?) of Bank and found correct."

In making such answers, instead of disclosing the facts regarding the speculations by said Schardt, of which he had not only heard, but of which he knew by said Schardt's admissions, he concealed the same, and made false and untrue answers to the questions. And at the time this statement was made that the books and accounts of the employee had been examined and found correct, the books of the Bank were out of balance $69,700, representing the default of the employee; and the notes in the Bank were less by $4,015.44 than the amount of notes called for upon the books of the Bank, which also represented a default by the employee.

By the terms of the subsequent contract, the Mechanics' Savings Bank and Trust Company agreed that any misstatement of a material fact in said application would render the bond void from the beginning.

But, misled by the false answers to the said questions, and deceived by the suppression of the facts known to said Mechanics' Savings Bank and Trust Company, and its president, Lewis T. Baxter, on January 1, 1893, petitioner issued and delivered to the Mecanics' Savings Bank and Trust Company, its bond, number 154,806, in the penalty of $20,000, whereby petitioner covenanted to reimburse to the Mechanics' Savings Bank and Trust Company, its representatives or assigns, the amount of any loss not exceeding $20,000, which should be sustained by it during the year 1893, by reason of any act of fraud committed by said Schardt, in connection with the duties of cashier, and constituting embezzlement or larceny.

After the issuance and delivery of said bond, the Mechanics' Savings Bank and Trust Company failing to exercise due and customary supervision over said Schardt for the prevention of default, said Schardt continued his embezzlements, and between the date the bond came into force and April 15, 1893, he embezzled the further sum of $16,971.82.

On April 15, 1893, after petitioner had learned of the speculations on the part of said Schardt, and, in consequence, had canceled the said bond, notifying the said Mechanics' Savings Bank and Trust Company that such cancellation was on account of learning of such speculations, said Mechanics' Savings Bank and Trust Company caused the books and accounts of said Schardt to be examined. Such examination, continuing during a part of that day, disclosed a shortage amounting to more than $100,000, to which said Schardt confessed. Knowing the whole of the capital stock of the Bank, and possibly a greater sum, to have been lost by the default of said Schardt, the board of directors of the Mechanics' Savings Bank and Trust Company, on April 17, 1893, the first business day after such discovery, caused to be executed a general assignment to James J. Pryor, conveying to him all its assets, for the equal benefit of all its creditors.

On April 19, 1894, James J. Pryor, a citizen of the State of Tennessee, as such assignee, filed his bill in the Chancery Court of Davidson County, Tennessee, in the name of the Mechanics' Savings Bank and Trust Company, for his use, against petitioner and the Union Bank and Trust Company, a corporation of the State of Tennessee, as administrator of John Schardt, who died on April 17, 1893, alleging, among other things, the holding by the said Schardt of the offices of teller and cashier, the issuance and delivery of the said two bonds of suretyship by petitioner, and the renewals of the first thereof, and the defaults above set out on the part of said Schardt, and praying for the taking of an account of such defaults and recoveries on said bonds for the full amounts thereof.

On June 11, 1894, and before the time petitioner was required to make defense to the bill under the laws of Tennessee, petitioner removed said cause to the United States Circuit Court for the Middle District of Tennessee, on the ground that petitioner, one of the defendants therein, was not a citizen of the State of Tennessee, but was a citizen of the Dominion of Canada, alleging that there existed in said suit a controversy between complainant and petitioner, which could be fully determined as between them.

On the same day, to wit: on July 11, 1894, petitioner filed its answer in said cause, setting up, among other things, the breaches on the part of the Mechanics' Savings Bank and Trust Company, of the conditions of the first bond on John Schardt, as teller and collector, whereby said Mechanics' Savings Bank and Trust Company agreed to observe, or cause to be observed, all due and customary supervision over said employee for the prevention of default, and to inspect or audit his accounts and books at least once a year, and to at once notify petitioner on its becoming aware of the said employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits, setting up that the certificates made yearly that the accounts of said employee had been examined and verified and found correct, on faith of which the yearly renewals were granted, were false and untrue; and setting up that the second bond, that on John Schardt as cashier, was issued on the faith of the representations of Lewis T. Baxter, president of the Mechanics' Savings Bank and Trust Company, that he had neither known nor heard anything unfavorable as to said Schardt's habits and associations, and that he neither knew nor had heard of any matters concerning which he deemed it advisable for petitioner to make inquiry, when in fact said Baxter knew of said Schardt's having been engaged in speculations, and being a partner in a firm organized to carry on a purely speculative business. That the books of the Bank show a very large default, which could have been detected by the slightest examination, and could not have been concealed if any examina-

tion whatever had been made. These matters and things, among others, petitioner set up to defeat a recovery on said two bonds.

The said cause was and is entitled in the Circuit Court of the United States for the Middle District of Tennessee, "The Mechanics' Savings Bank and Trust Company, to the use of J. J. Pryor, Assignee, etc., *v.* The Guarantee Company of North America."

Such proceedings were had in said case in said Circuit Court of the United States that, on July 1, 1895, the said Court rendered a decree therein, the material part of which is as follows:

The Court is of opinion and adjudges and decrees as follows:

That Schardt has been a defaulter within the sense of his two bonds; that in the years 1890 and 1891, the amount of his embezzlement from the Bank was comparatively small and has been paid out of assets and collections theretofore transferred to the Bank by Schardt to secure it, just before his death; that the embezzlements for the year commencing September 1, 1890, to January 16, 1891, amounting in the aggregate to $5,879.34, with interest to April 15, 1893, of $890.04, makes $6,769.38. From January 16, 1891, to January 1, 1892, $22,290.00, interest to April 15, 1893, of $2,299.08, added, makes $24,589.08. From January 1, 1892, to January 1, 1893, $50,649.90, with interest to April 15, 1893, of $2,086.27 added, makes $52,736.17; and these from January 1, 1893, to April 17, 1893, during the currency of his said bond as cashier, to $22,964.17, which, with interest to April 15, 1893, of $164.52, makes the sum of 23,128.69, in the aggregate; and that the total amount of said embezzlements during all the years mentioned in both positions, was of principal, $101,783.41, which, with interest to April 15, 1893, of $5,439.91 added, makes an aggregate of $107,223.36.

It appearing that Schardt had assigned to the Bank to indemnify it against loss, two lots of land assigned to J. B. Richardson, and life insurance policies amounting to $80,000.00, some of which policies have been paid to the assignee without suit, and others are now in litigation in this Court, or pending on appeal or writ of error to the Appellate Court of this Circuit, held at Cincinnati, the Court adjudges upon inspection of said guaranty bonds, their terms and various conditions, and the proof submitted, that the Bank has complied with the same and all its undertakings thereunder, substantially; and that said Schardt embezzled and fraudulently appropriated the moneys of the Bank while he filled

said two positions, to the amounts named; and that interest should be calculated upon said sums from the end of his respective terms.

The Court, after considering the various and numerous defenses set up by defendant Company, why a recovery should not be had upon either of said bonds, or both, in favor of complainant, is pleased to disallow each and all of said defenses, and to order, adjudge, and decree that complainant have its decree or judgment against the defendant, The Guarantee Company, upon each of said bonds, with interest from the time the same should have been paid, according to the terms of said bonds, and for the costs.

And the Court orders and decrees that the liability of the defendant, The Guarantee Company, is secondary to that of John Schardt's estate; and that the Bank or its assignee shall account for all collections realized on assets or collaterals turned over to the Bank by said Schardt to reimburse it against his shortage, which it has collected, or with due diligence may collect hereafter; and for his fitness, and for convenience, H. M. Doak, is appointed Master Commissioner to report the same to the next term of this Court; and the Court orders that the same be applied to the shortage of said Schardt in the order in which the same occurred, and in the meantime no execution will issue against defendants for the same, but only for the costs; and the Court orders that this cause may be continued upon the docket of this Court, for the purpose only of making any orders necessary to apply all collections from assets of Schardt, held as collateral, in exoneration, to that extent, of the defendant Company and of substituting the defendant to the rights of the Bank, in case the recovery herein is collected or paid, and any of said assets remain above the amount necessary to satisfy the shortage. But the case is retained for no other purpose, and the decree against defendant Company is final as fixing its liability on the bonds to make good the shortage, whatever that may be.

The said case in the said Circuit Court of the United States was heard before and decided by the Hon. C. D. Clark, District Judge for the Middle and Eastern Districts of Tennessee, sitting in said Court, and the opinion of the Court was delivered by him.

Your petitioner, on August 18, 1895, was duly allowed by said Circuit Court an appeal from its said decree to the United States Circuit Court of Appeals for the Sixth Circuit, and

On August 28, 1895, a certified transcript of the record and of

all proceedings of the said Circuit Court in said case was filed in the United States Circuit Court of Appeals for the Sixth Circuit, and the said case was entered and docketed in the said Court of Appeals and entitled "The Guarantee Company of North America, appellant, v. The Mechanics' Savings Bank and Trust Company, for the use of J. J. Pryor, Assignee, etc., appellee. No. 349."

The cause was heard in said Circuit Court of Appeals on December 11 and 12, 1895, before the Hon. Wm. H. Taft and the Hon. Horace H. Lurton, United States Circuit Judges for the Sixth Circuit, and the Hon. Eli S. Hammond, United States District Judge for the Western District of Tennessee; and, on October 5, 1896, the said Court rendered a decree affirming the said decree of said Circuit Court therein, as follows:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs."

Afterwards, and on October 28, 1896, in the said case in the said Circuit Court of Appeals, on motion of petitioner's counsel, an order was entered, extending the time for petitioner to file a petition for rehearing for thirty days from the day upon which the printed copy of the opinion of the Court in the case should be deposited in the clerk's office.

On April 29, 1897, such printed copy of the opinion of the Court in the case was deposited in the clerk's office.

Afterwards, and on May 27, 1897, petitioner filed its petition in said case in said Circuit Court of Appeals, praying to have said cause reheard, and if such rehearing should be denied, asking the said Circuit Court of Appeals to certify to this Honorable Court the important questions of law involved, for its determination, as provided by the sixth section of an Act of Congress, entitled "An

Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891.

Afterwards, and on July 6, 1897, the said Circuit Court of Appeals, being composed of the same Judges who had theretofore tried and determined the case, denied the petition for a rehearing.

Thereupon at the October, 1897, term of this Court, your petitioner presented its petition asking that the writ of certiorari be granted to bring up from the said Circuit Court of Appeals for the Sixth Circuit the transcript of the record, in order that the said decree might be reviewed and corrected in this Court. This petition was allowed and the certiorari granted, and thereupon said cause was duly brought to this Court and placed upon the docket, and at the October, 1898, term of this Court the cause came on regularly for hearing in this Court, and upon full argument the Court reversed and set aside the decree of the Circuit Court of Appeals for the Sixth Circuit, for the reason that it appeared to this Court that the decree of the Circuit Court for the Middle Division of the Middle District of Tennessee, upon which the appeal to the Circuit Court of Appeals was predicated, was not a final appealable decree. And thereupon the cause was remanded to the Circuit Court of Appeals for the Sixth Circuit with instructions to dismiss the appeal and remand the case to the Circuit Court for the Middle District of Tennessee for further proceedings in conformity with the opinion of this honorable Court, which is officially reported under the name and style of "Guarantee Company of North America v. J. J. Pryor, Assignee," 173 U. S., 587.

In accordance with the decree of this Court, the Circuit Court of Appeals for the Sixth Circuit did on June 10, 1899, reverse its former holding and remand said cause to the Circuit Court for the Middle District of Tennessee, to be further proceeded with in accordance with the decree of this Honorable Court.

Thereupon, upon the 5th day of December, 1899, the Circuit Court for the Middle District of Tennessee made and entered in said cause a decree, the substantial part of which is as follows:

"And thereupon, it appearing that the embezzlements of said Schardt during the currency of his bond as teller and collector is $78,819.24, without interest, and the interest on these various embezzlements from the end of each year to April 17, 1893, is $5,276, and the total of principal and interest is $84,095.35 to April 17, 1893; and it further appearing that the complainant has realized from policies and other sources the sum of $46,828.46, leaving the net amount due from said Schardt as teller and collector, during the currency of said bond, $37,266.89; and it further appearing that the plaintiff is therefore entitled to recover of the defendant the total amount of the penalty of the bond given as teller and collector, viz.: $10,000, with interest thereon from April the 9th day, 1894, to November 9, 1899, making of interest, $3,350 and the aggregate of principal and interest $13,350. And the Court finds that there are no credits to be made upon the bond as cashier and that the plaintiff is entitled to recover the penalty of the said bond, viz., $20,000 and interest from April 9, 1894, to November 9, 1899, amounting to $6,700, making an aggregate of principal and interest of $26,700, and making the total recovery of plaintiff against defendant of $40,050.

"The Court therefore orders, adjudges, and decrees that the Mechanics' Savings Bank and Trust Company, to the use of J. J. Pryor, Assignee, have and recover of the Guarantee Company of North America the said sum of $40,050, together with interest thereon until paid and the costs of the suit, for all of which execution shall issue as at law."

Thereupon by proper proceedings your petitioner removed said cause by appeal to the Circuit Court of Appeals for the Sixth Circuit, and filed therein the following assignment of errors:

I.

IN RE CASHIER'S BOND.

1. The Court erred in not sustaining the defense of a fraudulent and material misrepresentation by which the said bond was procured, such misrepresentation being that the books and ac-

counts of said employee had been examined and found correct December 31, 1892.

2. The Court erred in not sustaining the defense of a suppression of material matters affecting the risk, to wit: the fact that said employee had been known to have engaged in speculation and to have owned an interest in a brokerage concern while the teller of said Bank.

3. The Court erred in holding defendant liable for $5,992.35 of overdrafts by customers of the Bank, because the defendant only contracted to pay losses occasioned by the fraudulent acts of said employee and constituting larceny or embezzlement.

4. The Court erred in holding that said bond was ever in force or ever took effect.

II.

IN RE TELLER'S BOND.

1. The Court erred in not sustaining the defense of a material and fraudulent misrepresentation made by the complainant Bank to procure a renewal of said bond in January, 1892, said misrepresentation being that the books and accounts of the employee Schardt had been examined in December, 1891, and verified.

2. The Court erred in not sustaining the defense of a failure on the part of the Bank to notify the defendant of speculation by said employee during the currency of the bond.

3. The Court erred in not sustaining the defense of the failure of the Bank to cause to be observed all due and customary supervision of said employee to prevent a default during the currency of the bond.

4. The Court erred in not sustaining the defense of the failure of the Bank to make a proper inspection or audit of the books and

accounts of said employee once each year during the currency of the bond.

5. The Court erred in not dismissing the bill as to said bond.

Thereafter, and on the 19th day of March, 1900, said cause was duly heard and after full argument, and on the 24th day of March, 1900, the Circuit Court of Appeals for the Sixth Circuit delivered an opinion in said cause, and entered a decree in all respects confirming the decree of the Circuit Court for the Middle District of Tennessee, with the exception of an item of $5,992.35, "overdrafts allowed but not authorized."

The decree of the Circuit Court of Appeals is as follows:

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed except as to so much of the item of $5,992.35 overdrafts as may have been included in the decree, and so as to limit the recovery on the cashier's bond to $16,971.82 and interest thereon. Costs of appeal to be borne equally by appellant and appellees, and the cause is remanded to the Circuit Court with directions to modify its judgment to the extent indicated."

The only point discussed by the Circuit Court of Appeals in its opinion was that relating to this one item of overdrafts allowed but not authorized, and with the exception of this item adopted and approved its former opinion in this cause, being the opinion upon which the decree was based, and upon which this Court heretofore directed the cause to be brought to this Court upon writ of certiorari, to be here reviewed; and petitioner submits herewith a copy of said opinion as a part of this petition. See also 47 U. S Appeals, 91.

A certified copy of the entire record of the said case in said Circuit Court of Appeals is herewith furnished and hereto annexed

as part of this application, in conformity with rule 37 of this Honorable Court, relative to cases from Circuit Courts of Appeals.

Your petitioner is advised that the said decree of the said Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require said case to be certified to it, for its review and determination under and in conformity with the provisions of the sixth section of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the decree in said case being made final in the said Circuit Court of Appeals by the said Act.

Petitioner shows to the Court that the business of guaranteeing the fidelity of persons in positions of trust is of recent origin. It is the last phase of the insurance business to be developed to widespread extent. The business has, in the last few years, expanded very rapidly. At first confined to guaranteeing the fidelity of employees of railroad companies and banks, it has now extended to the making of bonds for every class of persons in positions of trust, in whatsoever manner named or appointed. Many of the largest employers of such persons now require such a bond as a condition of employment. Within the United States there are now fifteen companies, with a capital of $7,804,600, engaged in the business. Their total premium receipts for the year 1896 were $3,138,848. The total number of bonds issued was about 450,000, and the total amount of risk thereunder was $671,548,077. New companies are constantly organizing, and the business of making such bonds is steadily growing. So far as petitioner has been able to find, this is the first case arising in the Courts of the United States involving not only the disclosures required of persons seeking such bonds of indemnity in making application therefor, and the effect of misrepresentations made in such applications, but also involving the general rules which will govern the Court in consid-

ering the conditions and requirements of the bonds issued regarding supervision of the employer over the bonded employee. This suit presents fully the questions concerning the relations of the parties before and after the making of such bonds.

Petitioner shows to the Court that it is of the greatest moment and importance, not only to the companies, which have so large an amount at risk, but also to the employers who seek and procure such bonds, that there shall be an authoritative decision of the principles of law which govern the parties, both in the procuring of such bonds and in their relations to each other after their issuance and while they continue in force. If the holding of the Circuit Court of Appeals in this case that the employer, in seeking such bond, is not bound to make disclosure of such facts as may be known to him affecting the reliability of the employee sought to be bonded, even when asked in regard thereto by the bonding Company, and that an answer which can by any possibility be excused as not being in bad faith, shall not be deemed a misrepresentation avoiding the bond, and that, after procuring such a bond, the employer is bound to no duty and to no diligence in regard to a supervision of the employee, and all stipulations looking toward requiring the disclosure of discrediting facts known to the employer, either at the time of the issuance of the bond or becoming known to him thereafter, or stipulations regarding the supervision of the employee, are to be construed against the Company with the utmost strictness and harshness, shall be sustained and become the law of the land, it will have the effect to greatly increase the hazard and risk of the business to the companies engaged therein, will cause them heavy losses on bonds already in force, and will result in the permanent injury and loss of the public seeking such bonds, by requiring large increases in the premiums paid therefor, to cover the additional hazard and risk so incurred. It is therefore of the gravest importance to such companies and to the persons procuring their policies to have an early determination of the questions involved in this suit by this Hon-

orable Court, which, by reason of its authority in the United States Courts, and by reason of the comity of the Courts of the several States, will become the recognized rule of decision in all of the Courts of the United States and of the several States.

The said Circuit Court of Appeals, in laying down the principles which should govern the trial of suits on the bonds of suretyship—such as were issued by petitioner in this case—and in announcing the principles which would govern them in deciding the present case, used the following language in its opinion:

> In marine, fire, and life insurance it is not an unreasonable assumption that the owner knows more intimately than others can know the conditions which are material to the risk assumed, and it is therefore not unreasonable to require him to disclose those conditions to the insurer and to hold him strictly to that duty. But in an insurance like this the insurer and the insured deal at arm's length with each other and upon a plane of equal opportunity for information. Indeed, the risk does not depend so much on conditions of fact as upon a mere judgment about human character in the subject of the insurance — his individuality of moral qualities. About this the insurer can inform himself and the assured is not presumed to know anything, as in the case of the owner of a property or a life which has been insured. Hence it is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls fairly within the employment of the person whose honesty is guaranteed, and to permit no escape except by lines of retreat or avenues of deliverance clearly defined, well marked, and mutually understood as part of the contract—evidenced by the use of unambiguous language for that purpose.
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> And we wish further to remark that the business honesty or fidelity insured by such contracts as these is not that kind of enforced honesty which comes of a want of opportunity to be dishonest, but that which is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and, in the absence of evidence to the contrary, presumably that which is bargained for in each instance. A kind of honesty which will not take advantage of lapses of watch-

fulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, perhaps indulged because of reliance upon the insurance which has been accepted as a protection. An employer would need no insurance against that close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness except that which he has contracted to use, in plain words, for the benefit of the insurer.

The old form of bond and security was usually without covenants for watchfulness or inspection by the employer, or other obligee, and as that is the highest measure of liability of which the business is capable it is that which the obligee would naturally seek for his protection, always desiring presumably to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implied or general limitations upon the guaranty against loss by dishonesty, and in our judgment, these contracts are not to be construed as imposing any by mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness. The insurer gets what he contracts for in respect of that and nothing more, and he must provide by express stipulation for even ordinary prudence on the part of the assured in taking measures for minimizing or lessening the broad risk we have indicated as that most desirable to the assured, and, therefore, that which is intended to be covered by the words of insurance in these contracts; except so far as the "provisos and conditions hereinafter contained" shall have limited that broad liability. Nothing is to be implied not necessarily indicated by the words used, as might be in other examples of insurance where the relation of the parties and the character of the risk are different and where those relations properly breed implications that would import a meaning not admissible when the thing guaranteed is so far disassociated from any duty owing by the assured to the insurer as we find in the subject-matter of insurance here.

Petitioner now shows this Honorable Court that the Circuit Court of Appeals, in laying down the principle that the rules governing companies carrying on a suretyship business should be stricter and harsher than those applied in cases of contracts of marine, fire, and life insurance, acted on a false and untrue assumption, to wit: that companies engaged in such business could pos-

sess themselves of fuller information about the subject of the risk than marine, fire, and life insurance companies could about property or life on which insurance had been solicited. It is true that when an employee has, before his employment, been unknown to the person employing him, his employer seeking a bond and the Company of which such bond of suretyship is sought would have an equal opportunity of securing information concerning him, as to the factors which would enter into and determine the risk incurred by becoming such surety. But it is untrue that such Company would possess means of information equal to those of the employer, where the person on whom the bond is sought has been for years in the service of the employer, as said Schardt had been when the Mechanics' Savings Bank and Trust Company applied for the issuance of a bond on him as cashier.

Your petitioner, and the other companies engaged in a like business, have, by years of experience and observation, been able to determine the causes that ordinarily lead an employee in a position of trust to peculate. They have found that persons in positions of trust who speculate in stocks, grain, cotton, provisions, and like commodities, invariably, lured on by the hope of retrieving past losses, become defaulters to large amounts. They have further found that persons in positions of trust who are in the habit of gaming will, sooner or later, become losers, and, in consequence, defaulters, though the defaults consequent on such misconduct are not nearly so large as those resulting from speculations involving sums far greater than those at risk on games of hazard. They have found that when an employee has once yielded to temptation and defaulted, he is likely to again default. They have found that persons in positions of trust who lived beyond their income are likewise greatly exposed to the temptation of small peculation, particularly if addicted to immoralities and other excesses. They have further found that the risk is very much increased by the employee who is handling money being harassed by debt. They have found that a man's daily habits and associations determine very

largely the likelihood as to whether or not he will continue the faithful discharge of his duties. They have further found that outside of and beyond these personal elements, the character of the supervision over the employee for the prevention of default, and the probability or improbability of an early discovery of any shortage is a factor of the highest importance in determining whether or not it is likely that an employee will be guilty of his first embezzlement.

On all these points which alone enter into and determine whether or not a bond of suretyship shall be granted in the first instance, and, after it has been granted, whether or not it shall be continued, the employer in whose service an employee has continued for a long time is infinitely better able to know than any surety company applied to for a bond. It is to such employer that the Company must go for information as to the daily habits and associations of the employee, his former fidelity in the discharge of his duties, his habits of personal extravagance, causing his expenditures to exceed his income, and particularly whether or not he is addicted to gambling or speculation. Such employer alone can know what is to be the nature of the supervision over the employee for the prevention of default, and it is to the employer that such a Company must look for information in regard thereto.

Your petitioner, therefore, avers that no harsher or stricter rule should be applied in such cases than is applied in cases of other insurance, and particularly in cases of marine and fire insurance, which are very similar to suretyship or guarantee insurance in regard to the opportunities of information concerning the risk incurred. Petitioner further avers that the rules governing life insurance should be administered even more strictly than in suretyship insurance, for the reason that controversies regarding life insurance, involving the representations made to procure it, and the covenants regarding acts to be done on the part of the person whose life is insured, ordinarily does not arise until after the death of the person whose life is insured, and his representatives are cut

off from the benefit of his testimony. In the case of suretyship insurance, when a claim for a loss has been made both parties stand on an equal footing regarding their knowledge and ability to testify as to the representations made and the performance of the covenants put on the person holding the insurance.

In life and fire insurance, the insured is frequently ignorant and unused to dealing with a more experienced man, able to take advantage of his ignorance. It frequently happens that, in such insurance, the insured is financially weak and carries on an unequal struggle with an opulent opponent. In suretyship insurance, as a rule, the contrary is true. Persons and managers of corporations seeking such insurance are usually shrewd business men, abundantly able to take care of themselves in contracting, and ordinarily careful to know the terms of a contract and scrupulous to see that they fulfill their part. In any suit that may arise with a Guarantee Company they have ample resources so as to leave nothing in their favor undeveloped.

Your petitioner now shows that, under the evidence hereinbefore cited, the said Circuit Court of Appeals, in its statement of the case, which was a part of its opinion disposing of the cause, found and ascertained the following to be the facts:

It is in evidence that information came to the president and directors of the Bank through their cashier that Schardt was a partner in what is called "a bucket shop," an agency for promoting speculation in small amounts upon the fluctuations of stocks, grain, cotton, and other commodities in which speculative gambling is done, and that he himself was speculating. When charged with this Schardt admitted that he had taken an interest in such a partnership, but that he had sold out. He called his former partners to confirm his statement in this regard. He also admitted, according to one of the witnesses, at another time, that he had speculated to some extent, but asserted that he had always made gains and had seen the error of his ways and had stopped. Subsequently the cashier received an anonymous letter stating that Schardt was still speculating. He informed the president of the Bank. Schardt said it was a lie, and no more attention was paid to it. All this occurred prior to the time when the president signed the guarantee proposal for the cashier's bond referred to.

As a matter of fact Schardt was speculating all the time, and lost the $100,000 he had stolen in gambling in futures.

This Honorable Court, in the case of *Prather* v. *Preston,* reported in 137 U. S., 604, said in regard to the effect which information and knowledge that an employee in a position of trust has been speculating should have on his employer:

"In *Scott* v. *Bank, 72* Pa. St., 479, 480, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depository, without special contract or reward, was not liable for the loss of a government bond deposited with it for safe keeping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that 'no officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters whose peculations have been discovered to be directly traceable to this species of gambling.'

"A cashier, treasurer, or other officer having the custody of funds thinks that he sees a desirable speculation and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on, and he ventures again to retrieve his loss or increase his gain, and again and again he ventures. Thus, the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed. As stated above, the reasonable care which persons should take of property intrusted to them for safe keeping, without reward, will necessarily vary with its nature, value, and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him—as, for example, in the case of bankers and banking institutions having special arrangements, by vaults and other guards, to protect property in their custody. Persons, therefore, depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that, whenever ground for suspicion arises, an examination will be made by them to see that it has not

been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties and remove those employed whenever found wanting in either of these particulars.

"An omission of such measures would, in most cases, be deemed culpable negligence, so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor. . . . . Upon this subject the Court below, in giving its decision (29 Fed. Rep., 498), after observing that the defendants knew that Ker had been engaged in a business which was hazardous, and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous peculations, embezzlements, forgeries, and thefts, plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur."

Your petitioner, in the argument of the cause before the said Circuit Court of Appeals, had drawn its attention to the language of this Honorable Court in the case of *Prather* v. *Preston.* Said Circuit Court of Appeals, in its opinion, said that it agreed to all that had been said in the opinion in that cause, but, inasmuch as it did not appear that the failure to take cognizance of this speculation on the part of said Schardt, or to make report of it to your petitioner, then a surety on his bond as teller, or to communicate it to your petitioner when applying for a bond on said Schardt as cashier, was the result of bad faith on the part of any of the officers of the Bank, but only bad judgment in not being more affected by their information, held that it did not bar a recovery on the two bonds, and in regard thereto used the following language:

"But this defendant Company had not contracted for such a guaranty against negligence as had the depositors and bailees who sustained an action of damages in those cases, and this suggested analogy is neither a legal nor a fair test of the contract duty of the Bank to its insurer against Schardt's dishonesty in the premises. Here, again, it must be strictly limited to the words it has used in

defining that duty, and none is owed beyond the words by any kind of implications energized by any indignation at the negligence of the bank in not protecting itself, or indignation at the immoral conduct of Schardt. This insurer was insuring the Bank for its protection in just such emergencies and against just such negligence, unless the words of this policy speak to the contrary, and had received the consideration for it, while the depositors in the Bank, in the cases cited, had contracted for either common prudence, ordinary vigilance, or against gross negligence. It is a reversion of the attitude we have here, and it is a perversion of that principle to apply it here."

Then, proceeding to construe such bond as teller, which had expressly stipulated that "the employer shall at once notify the Company on its becoming aware of said employee being engaged in speculation or gambling, or indulging in any disreputable habits or pursuits," the said Circuit Court of Appeals held that inasmuch as when said Schardt had admitted his part ownership in a "bucket shop," and that he had been speculating, he claimed he had sold his interest in the "bucket shop" and had ceased to speculate, the Bank was not bound to give notice of the fact so coming to its knowledge, because it was a "past event," and that it would be held to the duty of giving notice of such speculation, gambling, disreputable or unlawful habits or pursuits only when he was engaged therein at the very instant and time of discovery. Your petitioner submits that by a fair construction of the words used in the stipulation for its protection, said Bank was bound to report its knowledge so obtained, even though said Schardt claimed that he had sold out his interest in the "bucket shop" and had ceased to speculate. Said Circuit Court of Appeals further held that, being a partner or stockholder in a "bucket shop" was not speculation or gambling, or engaged in it, *but only being the agent of those who were speculating and gambling.* The Court so held, notwithstanding it is a fact so widely and generally known that all Courts will take judicial notice thereof, that a brokerage business is one of agency where the broker takes the order of the person speculating and has it executed through a member of some one of the stock,

grain, or cotton exchanges, the member of such exchange through whom he deals securing either the profit or making good the loss to the broker's customer, while the broker, for compensation to himself, receives a small commission on the sale. In a "bucket shop," however, the orders are not executed on any exchange, but the "bucket shop" settles with persons dealing with it according to the rise or fall of the thing dealt in. It is the proprietors of the "bucket shops" who become the principals in the wager with the customer.

The said Circuit Court of Appeals further held that, should the Bank become aware of any disreputable habit or pursuit, and it was claimed the habit or pursuit had been abandoned, it was not bound to give notice thereof to the Company.

In the application for the cashier's bond, as hereinbefore set out, the president of the Mechanics' Savings Bank and Trust Company was asked, "Have you known or heard anything unfavorable as to his (the said Schardt's) habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the Company to make inquiry?" To both of said questions, said president had answered "No." Said Circuit Court of Appeals held, under the evidence hereinbefore cited, it did not appear that the said Baxter in bad faith withheld the information possessed by him; and, if in good faith, he did not believe what he heard to be unfavorable, because Schardt had ceased to speculate and had sold his interest in the "bucket shop," or in like good faith did not deem it advisable that the insuring Company should make inquiry, his answer was true, but he was made the judge of what was unfavorable or what was advisable. The Circuit Court of Appeals furthermore said that it doubted if dealing in futures or speculating would be considered as embraced in the question asked, and that, for an employee to be given to dealing in futures and to be speculating, would not be considered an unfavorable habit or association. The Court held finally, and repeated, that the quality of being unfavorable or advisable was

left open to construction by the mind of him who was answering the question, and assumed that the mind of said Baxter had so construed it. It appears from the transcript that said Baxter is living, and could have been called as a witness on behalf of the said assignee, but, for some reason, he was not called by him, nor was any explanation given of his failure to do so.

Your petitioner now shows to this Honorable Court that the opinion of said Circuit Court of Appeals is in irreconcilable conflict with the holding of this Court in the case of *Prather* v. *Preston.* The public interest demands that the authority of *Prather* v. *Preston* shall in nowise be diminished or impaired, and the effect of the holding of said Circuit Court of Appeals in the present case is to say that the superiors of employees in positions of trust, who are found to be speculating, are not, in all cases, bound to institute an immediate examination of their accounts, and to dismiss them from the position where they have an opportunity to wrongfully possess themselves of money for the continuing of their speculations, but that they can, at least so far as guarantee companies are concerned, continue them in their positions, without an examination of their books, hold them out as worthy of confidence, and secure guarantee insurance to whatever amount they may desire, and so place on such companies the losses which come from the defaults they will in all likelihood commit.

Petitioner further shows that during the whole of the time it was the surety of said John Schardt to said Mechanics' Savings Bank and Trust Company, there were kept in the Bank the accounts of the Bank with its individual depositors in two large books. These books were kept by one Frank Boensch, known as individual bookkeeper. With the keeping of these books said Schardt had nothing to do. There were, in addition, three general books, all kept by said Schardt: (1) a general ledger, showing generally the accounts of the Bank, including the total deposits, but not in detail the accounts of the depositors. It purported to

show the general deposits paid in and those checked out each day, and purported to show each day the aggregate amount due to depositors. It showed a statement of the demand loans, discounts, bonds, stocks, etc., owned by the Bank. (2) A cash book, showing day by day the entire business transacted on any particular day. For each day the account would begin with the cash on hand at the opening of the Bank on that day, and would be debited with all the receipts for the day, showing from what source derived, and would be credited with all disbursements, showing on what account made. (3) A daily balance book, showing a summary of each account in the general ledger, and showing at the end of each day's business all the assets and liabilities of the Bank under appropriate headings. Thus, it showed the amount of cash, notes, stock, bonds, etc., owned by the Bank, and the amount the Bank owed depositors, other banks, bills payable, etc.

It was found by said Circuit Court of Appeals, and stated in its opinion:

While Schardt was teller he kept the general ledger and the cash book, and made the daily statement of the bank. A clerk kept the individual ledger. The individual ledger was correctly kept. Whenever Schardt abstracted money from the deposits, he would place the items correctly in the cash book, but he would make false totals less by the amount he had taken than the true total, and these false totals he would transfer to the individual deposit account on the general ledger. Until 1890 it had been the practice in the Bank every month to take trial balances of the individual ledger accounts and verify the balances thus shown with those of the general ledger. Schardt directed the clerk to discontinue this, and thereafter, from 1890 until the collapse of the Bank no balance was ever taken from the individual ledger, and no comparison was ever made between Schardt's balances as shown by the general ledger and those which could have been shown by the individual ledger. These two ledgers were out of balance $2,098 January 16, 1891; $19,600 January 1, 1892, and $69,700 January 1, 1893. The discrepancies were caused by Schardt's embezzlement of the deposits. In addition to this amount, Schardt embezzled $3,765.44 in the year between January, 1891, and January, 1892, and $4,015.44 in the year between

January 1, 1892, and January 1, 1893, of money received by him from the proceeds of notes due the Bank and in his custody for collection. The finance committee of the board of directors of the Bank made quarterly examinations of the Bank. These examinations consisted of checking over a statement made by Schardt of the condition of the Bank with the notes and securities and cash which he produced, and with statements from other banks of credit balances. There is some doubt as to whether the finance committee saw the cash book or what purported to be a copy of a statement taken from it.

The undisputed and uncontradicted evidence, both of the witnesses for petitioner and of the witnesses on behalf of the assignee, showed that it was customary in all banks, whether large or small, to compare, at least once a month, the amount shown to be due to individual depositors by the ledger of individual deposits with the amounts shown to be due depositors by the general ledger and the daily balance book. The said Circuit Court of Appeals made no finding in regard to the conclusion established by said evidence, but said in regard thereto:

Much proof was taken to show what kind of supervision is ordinarily and prudently taken by other banks and generally in the banking business to prevent default, it being assumed that there was a contract here for that kind of supervision, or at least that which ordinary prudence in any business would require. Certainly these words may mean that but not necessarily. They may mean less. For example, they may mean that "due and customary supervision," which obtained in this particular Bank, not over all employees, but over the teller; not over all its business in every direction, but only over that which he did. It may mean that which was in vogue when the contract was made, or that coming subsequently into use as affording a better mode of detection. If that supervision which was customary for the authorities of this Bank to keep over the teller was careless and ineffective for detection, it would be none the less "due and customary," and that which they took "to prevent default."

. . . . . .

The words of either of the bonds we have quoted are ambiguous and may embrace any degree or acts of supervision, from the highest and most certainly effective to those which are at least so, as long as they were "customary" or "due." The standard of ex-

cellence or efficiency is not definitely mentioned, nor is any rule of custom definitely prescribed, whether of this Bank or of all banks, or of any business in which cashiers and tellers are employed. By the rule we have laid down, the defendant company should have been more specific in defining the supervision they required, and the contract should have added, if that was the intention, all due and customary supervision in use in the best-managed banks or generally in use by banks conducted with ordinary prudence and skill, or some words sufficiently designating the general custom now sought to be relied on — if there were at that time any such general custom prevailing in the management of banks; not words applicable to any prudent supervision in many differing ways, but those pointing out a custom of supervision in the particular way now insisted upon.

Said Circuit Court of Appeals, in its opinion, under authority of two cases adjudged by this Court *(Goddard* v. *Foster,* 17 Wall., 123, and *Insurance Co.* v. *Wright,* 1 Wall., 456), held that parol evidence of usage or custom was not admissible to vary, control, or contradict an express contract; but, inasmuch as when the Mechanics' Savings Bank and Trust Company, when applying for a bond on John Schardt as teller, was asked, in its application, by your petitioner, "What is your *custom* in regard to the frequency of inspections? Are they at stated intervals or irregular, and what is the longest time allowed to elapse between inspections?" and answered, "Every quarter," it was the duty of the Court, in accordance with familiar general rules of technical interpretation, to read those words, "due and customary," in the light of that question and answer, and to hold that such quarterly inspection was the due and *customary* supervision referred to in these bonds and provided for by the contract; and your petitioner having thus expressly contracted as to the "custom," could not be permitted to show what in all other banks was considered due and customary supervision for the prevention of default.

In disposing of the further defense interposed by petitioner, that the renewal of the teller's bond for the year 1892 was procured by the false statement contained in the certificate of the Bank that

the accounts of said Schardt, up to the first of January, 1892, had been examined and verified, when, in fact, they had been neither examined nor verified, and such examination or verification would have at once disclosed the existence of the default, said Circuit Court of Appeals held as follows:

However careless the examination may have been, if made in good faith and the examiners believed the accounts correct, they might truthfully so represent them, albeit they were not correct. The position of the defendant Company leaves no margin here, and holds the Bank to absolute truthfulness, not of the fact of examination made in good faith and a belief in correctness, but of the soundness of Schardt's entries and accounts and their freedom from fraud, no matter how skillfully a fraud may have been concealed by him. The facts do not show any such intentional representation, and the words do not define such a complete assurance. The words "correct" and "verified" may mean that but also less in any degree. One "verifies" an account by merely adding up or doing the other work of mathematical calculation and finding the figures correct or by such comparison of entries and items as one may make and find "correct," and any extent of this is "examination," however superficial. These representations do not say that the examination was skillful or extensive or by comparison of books and trial balances, but only that such examination as was made disclosed no error or fraud, and if this was done in good faith, as there is no doubt it was, it fully meets the representations made unless we are to imply that the parties intended such a thorough examination as would save the insurer harmless, and this, we think, was not contracted for in plain and unambiguous language, as it might have been, if intended.

Petitioner shows that the substance of the holding of said Circuit Court of Appeals was that a surety company, in the absence of stipulations in respect thereof, was not entitled to have any degree of supervision kept over the employee for the prevention of default; and if a stipulation should be made regarding such supervision, the words used were not to be taken in their plain and ordinary sense and acceptance, but were to be construed against the surety company with the utmost harshness, and if an examination, however loose, could by a construction, however strained, be made to satisfy the letter of the bond, it should be deemed sufficient.

The reason stated by the Court is that such bonds of indemnity are sought for the purpose of enabling bank officials to be able to relax their vigilance, and to feel secure because they hold such indemnity.

Your petitioner shows that such a view wholly mistakes the purpose and scope of such insurance. No vigilance, however great, no supervision, however strict, can entirely eliminate the possibility of peculation on the part of the employee. There comes an interval between all examinations, when an embezzlement can not by any possibility be prevented. With every examination, however strict and thorough, there is a manipulation possible by which a default can for a time be covered up. Such bonds are sought not for the purpose of rendering examinations useless, and not for the purpose of being able to relax the supervision over the employee, but for the purpose of covering this element of chance of an embezzlement which no foresight and no care can guard against. Such insurance is never sought for an amount equal to the sum to come into the hands of the employee, or the amount of a possible embezzlement. In the present case, notwithstanding Schardt had the opportunity to, and as teller did, embezzle exceeding $70,000, yet the penalty of the bond was for only $10,000. In the present case it can not be said that the bond was procured for the purpose of enabling the Bank officials to relax the vigilance of their supervision over its teller, for the reason that the amount of his possible embezzlement was many fold the penalty of the bond, and the amount of his actual embezzlement was seven-fold its penalty.

Your petitioner shows that it would be contrary to public policy, and greatly detrimental to the public interest, for the rule to be established that the officials of corporations can dispense with all care in overlooking employees under them if they hold a bond for a fraction of the amount which they might embezzle.

Your petitioner shows that the present judgment of the Circuit Court of Appeals has excused a negligence that has gone to the

extremest possible limit. For three years the ledgers of the Bank were out of balance, for a long time in an amount exceeding the capital stock of the Bank, and a comparison of these, such as is customary in all other banks every thirty days, and was customary in this Bank until just before the default commenced, would have in an instant disclosed the existence of such shortage and its approximate amount. For three years the notes in the hands of the teller and cashier did not correspond with the notes a list of which was found in the general books, and a comparison of them at any time within the last three years of Schardt's connection with the Bank would have disclosed such shortage and its amount. Such a comparison is the first principle of every examination.

In fact, said Circuit Court of Appeals, in its opinion as first prepared and printed, said:

"We concede that it is difficult to see how the officials of this Bank could have failed, by ordinary prudence, to have discovered these frauds, or how, without some negligence, the losses could have occurred. But it does not follow from this that this Company, which has guaranteed to the Bank and its stockholders the fidelity of the teller and cashier, can escape its liability because of such negligence."

When the opinion was filed with the clerk of the Circuit Court of Appeals, on April 29, 1897, as may be seen from page 13 of the opinion, as found in the transcript accompanying this petition, the sentence just quoted was changed to read as follows:

"If we were to concede that the officials of this Bank could not have failed, by ordinary prudence, to have discovered these frauds, or that without some negligence the losses could have occurred, it would not follow from this that this Company, which has guaranteed to the Bank and its stockholders the fidelity of the teller and cashier, can escape its liability because of such negligence."

This Honorable Court, in *Briggs* v. *Spaulding*, 141 U. S., 132, said:

"We hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this does not absolve them from the duty of reasonable supervision."

Not only was the Bank bound to exercise such a reasonable supervision, through its board of directors and its finance committee, but it was bound to exercise a stricter and more rigid supervision through its president and cashier, salaried officers constantly at the Bank, and the supervisors of said Schardt so long as he was teller.

Petitioner is advised that as a matter of law such duty of reasonable supervision was imposed on the officers and directors of the Mechanics' Savings Bank and Trust Company, and that duty was in favor of every person who would be injured by its neglect, including the surety on the bond of its officers handling its cash and funds. Petitioner is further advised that particularly was this duty owed to it, as it was expressly stipulated for in the bonds, and the holding of the said Circuit Court of Appeals is in irreconcilable conflict with the holding of this Honorable Court in *Briggs* v. *Spaulding*.

Finally, petitioner shows that whatever may be the rule of construction of the provisions of the bonds regarding supervision, and however forced the meaning given to the words, there is no possible construction which does not involve a violation of its duty and agreement on the part of the Mechanics' Savings Bank and Trust Company. Whether the words mean the kind of supervision that is ordinarily and prudently taken by other banks, or generally in the banking business, or that which obtained in this particular Bank, either over all its employees or over the teller, or over its business in every direction, or over that which the teller did, or that in vogue when the contract was made, or that subsequently coming into use, in each and every case which the ingenulty of the

judge delivering the opinion was able to suggest, there was not, on the part of the Bank, that supervision it agreed to exercise.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and all the proceedings of the said Circuit Court of Appeals in the said case therein, entitled: "The Guarantee Company of North America, Appellant, v. The Mechanics' Savings Bank and Trust Company, for the use of J. J. Pryor, Assignee, etc., Appellee," No. 792, to the end that said case may be reviewed and determined by this Court, as provided in the sixth section of the Act of Congress entitled, "An Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate, and in conformity with said Act, and that the said decree of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

GUARANTEE COMPANY OF NORTH AMERICA,
By WILLIAM L. GRANBERY,
Solicitor and Counsel for Petitioner.

STATE OF TENNESSEE,
DAVIDSON COUNTY. } *ss.*

Theo. Cooley, being duly sworn, says that he is the general agent for the Southern Department of the Guarantee Company of North America, the petitioner above named, and as such has had personal charge for it of the case mentioned in the foregoing peti-

tion in the Circuit Court of the United States for the Middle District of Tennessee, and in the United States Circuit Court of Appeals for the Sixth Circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his information and belief.

THEODORE COOLEY.

Sworn to and subscribed before me April 18, 1900.

CHAS. C. TRABUE,
Notary Public.

NASHVILLE, TENN., April 18, 1900.

I, Edward H. East, solicitor for Mechanics' Savings Bank and Trust Company for the use of J. J. Pryor, Assignee and apellee, hereby acknowledge notice of the within application for a certiorari and agree that the same may be presented at the convenience of appellant, the Guarantee Company of North America.

MECHANICS' SAVINGS BANK AND TRUST CO.,
for use of J. J. Pryor, Assignee.

By EDWARD H. EAST,
Solicitor.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS,

SIXTH CIRCUIT.

THE GUARANTEE COMPANY OF NORTH AMERICA,
Appellant,

v.

THE MECHANICS' SAVINGS BANK & TRUST COMPANY,
For the use of James J. Pryor, Assignee, Appellee.

No. 349.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

SUBMITTED DECEMBER 12, 1895. DECIDED OCTOBER 5, 1896.

BEFORE TAFT AND LURTON, CIRCUIT JUDGES, AND HAMMOND, DISTRICT JUDGE.

This was a bill in equity filed in the Chancery Court of Davidson County, Tennessee, by the assignee for the benefit of creditors of the Mechanics' Savings Bank and Trust Company, against the Union Bank and Trust Company, administrator of John Schardt, deceased, a corporation of Tennessee, and the Guarantee Company of North America, a corporation of Canada, to state an account between the bank and John Schardt, its deceased cashier and teller, to obtain a decree properly applying certain credits to the debt in favor of Schardt, and to recover the balance found to be owed by Schardt to the Bank, from the Guarantee Company on two bonds or fidelity insurance contracts entered into by Schardt and the Guarantee Company with the Bank, indemnifying it from loss by the dishonesty of Schardt, one covering his dishonest acts while he was teller of the Bank, and the other for his dishonest acts while he was its cashier. The Guarantee Company removed the cause to the Court below on the ground that there was in the

case a separable controversy between the complainant, a citizen of Tennessee, and the Guarantee Company, an alien corporation. The bonds sued on were joint and several obligations of Schardt and the Guarantee Company. Schardt's administrator demurred to the bill for want of equity in the State Court, and the record shows no further proceedings against it. No motion to remand was made, and the cause proceeded in the Court below against the Guarantee Company alone, the two parties stipulating that the cause should be heard in equity, or if removed to the law docket, that a jury should be waived and trial had to the Court.

Schardt was teller of the Bank from January 16, 1888, until January 1, 1893. He was cashier from January, 1893, until his death, April 17, 1893. The bond covering his acts as teller was given in 1888 for a year, and was renewed from year to year until January, 1896, when a new bond, covering his acts as cashier, was given. The teller's bond recited that the bank had delivered to the Guarante Company a certain statement, and that it was agreed and understood that the statement constitued an essential part of the contract of indemnity. In consideration of $100 a year, the Company then agreed to make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the fraudulent acts of the employee in connection with the duties of his said office or position or with any other duties assigned to him by the employer in the said service, committed by him and discovered during the continuance of this bond and within six months from the employee's ceasing to be in the said service. The bond provided further that:

"The following provisions are also to be observed and binding as a part of this bond: That this bond is issued and renewed on the express understanding that the employee has not, within the knowledge of the said employer at any further period either in this or other employment been guilty of any default or serious dereliction of duty.

"That the employer shall observe or cause to be observed all due and customary supervision over the said employee for the prevention of default, and if the employer shall at any time during the

currency of this bond condone any act or default on the part of the employee, which would give the employer the right to claim hereunder, and shall continue the employee in his service, without notification to the Company, the said Company will not be responsible hereunto for any default which may occur subsequent to said act or default of said employee so condoned.

"That the employer shall at once notify the Company on his becoming aware of the said employee being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits.

"That there shall be an inspection or audit of the accounts or books of the employee on behalf of the employer at least once in every twelve months from the date of this bond.

"That the Company shall not in anywise be responsible to the employer under this bond to a greater extent than ten thousand dollars."

By another provision Schardt agreed to keep the Company harmless from any payment it might have to make under the bond. The bond is signed by Schardt, the Guarantee Company, and the Bank.

The statement referred to in the bond contained twenty questions and answers concerning the Bank's knowledge of Schardt's integrity and past business life, the character of supervision to which he was subjected in discharging his duties and the salary paid him. Of these the following only are material here:

7. When was the last inspection of the office at which he was stationed made?

A.—December 24, 1887.

8. What is your custom in regard to the frequency of inspections? Are they at stated periods or irregular, and what is the longest time allowed to elapse between inspections?

A.—Every quarter.

9. Has the Bank a duly appointed and authorized inspector or inspectors? If not, by whom are the inspections made?

A.—The finance committee.

. . . . . .

18. In the event of the employer filling the post of teller, how often and by what officer will the teller's cash be checked and counted?

A.—By the finance committee; quarterly.

At the end of each year of the bond, the Bank received the following notice:

"It is necessary, before the bond can be renewed, that you obtain the certificate on the back hereof by your president or cashier, and on its return with the remittance of the premium, the renewal can be immediately effected."

The certificate was accordingly filled up and signed by the cashier of the Bank at each renewal. Among other things it stated that the accounts of Schardt, the teller, had been examined and verified by the finance committee of the Bank. On such certificate the bond was renewed.

The cashier's bond was given in January, 1893. By its terms Schardt and the Company, the latter relying on a certain guarantee proposal signed by the president of the Bank and on its strict performance and observance thereafter, bound themselves jointly and severally, in the sum of $20,000, to reimburse the Bank to the extent of $20,000, for any loss sustained through Schardt's act or fraud in connection with his duties as cashier and constituting embezzlement or larceny. The bond was made subject to certain conditions endorsed on it, among which were the following:

1. Any misstatement of a material fact in the declaration within mentioned or in any claim made under this bond, will render this bond void from the beginning.

2. That the said employer shall use all due and customary diligence in the supervision of said employee for the prevention of default, and to that end shall cause an inspection of his accounts to be made at least once within twelve months.

The guarantee proposal contained nineteen questions concerning Schardt and circumstances of supervision, etc.

Of these, only the following are material:

Q. 4. Have you known or heard anything unfavorable as to his habits or associations, past or present? Or of any matter concerning him about which you deem it advisable for the Company to make inquiry?

A.—No.

Q. 12. Has there been any default in the Bank by any employee in applicant's position?

A.—No.

Q. 13. When were applicant's books and accounts (including cash, securities, and vouchers, if any), last examined, and by whom?

A.—December 31, 1892, by finance committee of Bank, (were they found correct?) and found correct.

Q. 14. In case of applicant handling cash or securities, how often will the same be examined and compared with the books, accounts, and vouchers, and by whom?

A.—Not less than quarterly, and often monthly, by finance committee.

The above answers and representations are true to the best of my knowledge and belief.

This was signed by the president of the Bank. While Schardt was teller he kept the general ledger and the cash book and made the daily statement of the Bank. A clerk kept the individual ledger. The individual ledger was correctly kept. Whenever Schardt abstracted money from the deposits, he would place the items correctly in the cash book, but he would make false totals less by the amount he had taken than the true total, and these false totals he would transfer to the individual deposit account on the general ledger. Until 1890 it had been the practice in the Bank every month to take trial balances of the individual ledger accounts and verify the balances thus shown with those of the general ledger. Schardt directed the clerk to discontinue this, and thereafter, from 1890 until the collapse of the Bank, no balance was ever taken from the individual ledger, and no comparison was ever made between Schardt's balances as shown by the general ledger, and those which could have been shown by the individual ledger.

These two ledgers were out of balance $2,098 January 16, 1891; $19,600 January 1, 1892, and $69,700 January 1, 1893. The discrepancies were caused by Schardt's embezzlement of the deposits. In addition to this amount, Schardt embezzled $3,765.44 in the year between January, 1891, and January, 1892, and $4,015.44 in the year between January 1, 1892, and January 1, 1893, of money received by him from the proceeds of notes due the Bank and in his custody for collection. The finance committee of the board of directors of the Bank made quarterly examinations of the Bank. These examinations consisted of checking over a statement made by Schardt of the condition of the Bank, with the notes and securities and cash which he produced, and with statements from other banks of credit balances. There is some doubt as to whether the finance committee saw the cash book or what purported to be a copy of a statement taken from it. The evidence of the experts is that the account of bills payable shown on the cash book and ledger is correct, indeed, that every account except the individual deposit account on those books is correct. Neither the finance committee nor the cashier ever asked for a trial balance from the individual ledgers. After January 1, 1893, when Schardt became cashier, he continued his thefts and between that date and April 17, 1893, the date of his death, he stole $22,964.17 more, so that his total stealings amounted to more than $100,000, or double the entire capital of the Bank. It was in evidence that it was the universal banking custom in banks, large and small, to take trial balances from the individual ledgers at least once a month, and often every two weeks, and to compare these balances with those of the general ledger. A trial balance of the individual ledgers might have been taken by a clerk in one or two days.

It is in evidence that information came to the president and directors of the Bank through their cashier that Schardt was a partner in what is called "a bucket shop," an agency for promoting speculation in small amounts upon the fluctuations of stocks, grain, cotton, and other commodities in which speculative gambling is done, and that he himself was speculating. When charged with this Schardt admitted that he had taken an interest in such a part-

nership, but that he had sold out. He called his former partners to confirm his statement in this regard. He also admitted, according to one of the witnesses, at another time, that he had speculated to some extent, but asserted that he had always made gains, and had seen the error of his ways and had stopped. Subsequently the cashier received an anonymous letter stating that Schardt was still speculating. He informed the president of the Bank. Schardt said it was a lie, and no more attention was paid to it. All this occurred prior to the time when the president signed the guarantee proposal for the cashier's bond referred to. As a matter of fact, Schardt was speculating all the time, and lost the $100,000 he had stolen in gambling in futures.

HAMMOND, District Judge, delivered the opinion of the Court.

The first question which arises on this record is one of jurisdiction. Was there a separable controversy between the plaintiff, a citizen of Tennessee, and the Guarantee Company, an alien corporation? The contracts upon which the action was founded were somewhat different in form. In the bond for Schardt as cashier there is no provision by which Schardt assumes an obligation directly to the Bank for his own defalcations. He seems to be made a party merely that he may enter into certain obligations to the Guarantee Company in case of his defalcation. It can hardly be said, therefore, that the Guarantee Company's liability to the Bank is joint with that of Schardt. In the teller's bond, however, the obligation of Schardt and the Guarantee Company is joint and several. In suit upon the latter, therefore, the Bank and its assignee had the option to begin its action against the obligees jointly or separately, and the obligee could not control the form of the action in this regard. Therefore it could not be removed as a separable controversy by the Guarantee Company when Schardt was its codefendant against the objection of the plaintiff. Of course the plaintiff could if it chose at any time dismiss Schardt's representatives from the suit and make it a several suit against the Company. By making no objection to the removal, by making no motion to remand, and by proceeding to trial without protest and taking a separate judgment against the Guarantee Company we must hold that it consented to a severance of the joint action into two

several actions, one against Schardt, which seems to have remained in the State Court or to have been dismissed, and the other against the Guarantee Company, of which the Court below might properly take jurisdiction on the ground of diverse citizenship. Of course consent can not give jurisdiction to the Federal Court over an action not cognizable therein, but when it is cognizable as its form is joint or several, and a party has the option to treat it as either, we think in order to maintain the jurisdiction when it has been exercised, without objection from him, that he should be held to have elected to treat the action as several as of the time when the removal was effected. Where a petition for removal is filed after the time required by law and no objection is made before trial, the defect is waived.

Martin's Adm'r v. *B. & O. R'y Co.*, 149 *U. S.*

By analogy in such a case as this where it is completely within the power of a party to frame or change his action so as to be cognizable in the Federal Court, and by his silence and affirmative conduct avoids any question of the jurisdiction and proceeds to trial, he does thereby elect to change his action to one within the Court's jurisdiction.

The next question is also one not raised by the parties but one to which the Court must refer. This is a bill in equity to recover on a contract of fidelity insurance. Equitable jurisdiction was asserted in the bill on the ground that the determination of the liability of the defendant involved the examination of a complicated account not conveniently to be examined in a Court of law and also on the ground that there were quite a number of credits to be allowed the defendant in the account, the proper mode of applying which required the action of a chancellor. A stipulation filed in the case above shows that both parties preferred the equity jurisdiction and no objection is made to it in this Court. It may be doubtful whether if the point had been sharply contested by demurrer below, the equity of the bill could have been maintained. It is true that there is a concurrent jurisdiction of matters of account in law and equity. 1 Story's Eq. Jurisp. 443. But it is laid down that where all the items of the account are on one side and no discovery is asked, there is no equity jurisdiction. 1 Dan-

iells' Ch. Pr., 551; 1 Story's Eq. sec. 459; *Fowle* v. *Lawrason*, 5 Peters, 495. It is true there are a few large items of credits, but it is not clear that they would make the account a mutual one in the sense in which it is understood in equity. However this may be, we think it our duty to proceed to consider the cause on the merits under the rule laid down by this Court in *Reynolds* v. *Watkins*, 9 C. C. A., 273, and *McConnell* v. *Provident Savings Life Assurance Society*, 69 Fed. Rep., 113. In those cases we held, following the decisions of the Supreme Court, that where a case with no trace in it of a ground for equitable jurisdiction of it came before the appellate court, it was the duty of this Court to reverse the decree and remand the case to the lower Court with instructions to redocket the cause on the law side; but that where the case was of a class of cases usually cognizable in equity but lacking only in some one element necessary to justify that jurisdiction, it was too late for a party who had consented, or not objected, to the forum below, to urge the objection in this Court. We followed in these cases the distinctions shown in the decisions of the Supreme Court of the United States in the following cases: *Reynes* v. *Dumont*, 130 U. S., 355; *Kelbourne* v. *Sunderland*, 130 U. S., 505; *Lewis* v. *Cocks*, 23 Wall., 466; *Oelricks* v. *Spain*, 15 Wall., 211. The feature of the complicated account is certainly present in the case at bar, and thus it is of a class of cases cognizable in equity, and though the fact that the defendant's credit items are not numerous enough to make it strictly a case of mutual accounts, we think it within the rule which requires us to enforce a waiver of the question of equitable jurisdiction against a party objecting for the first time in the appellate court and which *a fortiori* requires us to maintain the jurisdiction when, as in this case, no objection is made even here. See also *Waite* v. *O'Neil*, 72 Fed. Rep., 348.

The defenses to this action involve a proper construction of the language of the bonds rather than any conflict about the facts. While in contracts like this the more natural attitudes of a "surety" is assumed by the form, it is, in effect, one of insurance, and whatever indefiniteness of language or ambiguity of expression there may be should be resolved most favorably to the assured, not only because it is the language of the insurer, but also because the

general purpose of the contract is full indemnity, and this should not be defeated except by clear and unambiguous limitations assented to by the parties. *Imperial Fire Insurance Co.* v. *Coos*, 151 U. S., 452; *Thompson* v. *Phoenix Ins. Co.*, 136 U. S., 287, 297; *National Bank* v. *Ins. Co.*, 95 U. S., 673, 678--'9; *Supreme Council, Catholic Knights of America* v. *Fidelity & Casualty Co.*, 63 Fed. Rep., 48; *Tibbits* v. *Ins. Co.*, 73 Fed. Rep., 95, 96; *American Credit Indemnity Co.* v. *Wood*, *id.*, 81, 88. And the safe-guarding of this rule against any abuse of its application is nowhere better done than by Mr. Justice Jackson when he says: "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary, and popular sense."

Imperial Ins. Co. v. *Coos, supra.*

It is a familiar rule of interpretation that we shall look to the general purpose of the parties to the contract to see what they intend to provide. *Waite* v. *O'Neil*, Court of Appeals, Sixth Circuit, October term, 1896. The old-fashioned bond to secure fidelity of trust administration being a contract of suretyship, strictly, and not of indemnifying insurance, in the expansion of the modern contrivance of organizing incorporated companies to furnish a guaranty of fidelity, these contracts naturally took the form of a bond, as these do, rather than that of a policy of insurance. But as to this subject-matter of indemnity, as well as to the multitude of others formerly covered by bonds to which the principle of insurance is being so comprehensively applied, the general object is that of a protection as broad at least as that afforded by the old-fashioned bond, the form of which has been assumed, and for which the modern contrivance is intended to be a substitute. Marine, fire, or life insurance against the destructive forces of nature are not quite the same thing as an insurance against the dangers of dishonesty and the risk being entirely of a different nature, the courts must interpret the contract in view of this difference, applying the words used to the purpose of covering the peculiarities of

the risk assumed on the one hand and on the other intended to be discarded, or shifted to others. And if these new contracts, whatever their form, are to be turned into contracts of insurance, the courts will be careful not to again perplex themselves with regretable technicalities of law, such as have sometimes crept into the older contracts of insurance and have required statutes for their removal. In marine, fire, and life insurance it is not an unreasonable assumption that the owner knows more intimately than others can know the conditions which are material to the risk assumed, and it is therefore not unreasonable to require him to disclose those conditions to the insurer and to hold him strictly to that duty. But in an insurance like this the insurer and the insured deal at arm's length with each other and upon a plane of equal opportunity for information. Indeed, the risk does not depend so much on conditions of fact as upon a mere judgment about human character in the subject of the insurance—his individuality of moral qualities. About this the insurer can inform himself and the assured is not presumed to know anything, as in the case of the owner of a property or a life which has been insured. Hence it is not unreasonable to hold the insurer to his risk in the broadest sense that is required to indemnify the assured for any loss by dishonesty which falls fairly within the employment of the person whose honesty is guaranteed, and to permit no escape except by lines of retreat or avenues of deliverance clearly defined, well marked and mutually understood as part of the contract—evidenced by the use of unambiguous language for that purpose. It would be contrary to public policy to inconsiderately allow the protection afforded by this new insurance to the vast business interests of the country, in public administration, as elsewhere, to be endangered by any lesser indemnity than that of the old form, by bond, which is being so rapidly displaced, the new contracts being offered by the companies as superior to the old in safety. The courts should interpret them with a view of accomplishing what the companies propose to secure by adhering strictly to the rule we have quoted in the language of Mr. Justice Jackson. And we wish further to remark that the business honesty or fidelity insured by such contracts as these is not that kind of enforced honesty which

comes of a want of opportunity to be dishonest, but that which is to be sturdy enough to operate for safety, spite of opportunity and temptation. That is the only kind of insurance worth the premium paid by the assured, or which is a fair consideration for the risk of loss which he opens under the protection of the guaranty, and, in the absence of evidence to the contrary, presumably that which is bargained for in each instance. A kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances adjusted to familiar traits or habits of carelessness on the part of the employer, perhaps indulged because of reliance upon the insurance which has been accepted as a protection. An employer would need no insurance against that close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness except that which he has contracted to use, in plain words, for the benefit of the insurer.

The old form of bond and security was usually without covenants for watchfulness or inspection by the employer, or other obligee, and as that is the highest measure of liability of which the business is capable it is that which the obligee would naturally seek for his protection, always desiring presumably to provide by some such guaranty even against his own negligence and careless business habits. The nature of the risk forbids the idea of any implied or general limitations upon the guaranty against loss by dishonesty, and, in our judgment, these contracts are not to be construed as imposing any by mere inference of an understanding between the parties that the business will be conducted with either ordinary or any degree of diligence or prudence as to watchfulness. The insurer gets what he contracts for in respect of that and nothing more, and he must provide by express stipulation for even ordinary prudence on the part of the assured in taking measures for minimizing or lessening the broad risk we have indicated as that most desirable to the assured, and, therefore, that which is intended to be covered by the words of insurance in these contracts; except so far as the "provisos and conditions hereinafter contained" shall have limited that broad liability. Nothing is to be implied not necessarily indicated by the words used, as might

be in other examples of insurance where the relation of the parties and the character of the risk are different, and where those relations properly breed implications that would import a meaning not admissible when the thing guaranteed is so far disassociated from any duty owing by the assured to the insurer as we find in the subject-matter of insurance here.

Coming now to a critical examination of these contracts we find that one of them provides "that the employer shall observe or cause to be observed all due and customary supervision over the said employee for the prevention of default." The other that "the said employer shall use all due and customary diligence in the supervision of said employee for the prevention of default," etc. Much proof was taken to show what kind of supervision is ordinarily and prudently taken by other banks, and generally in the banking business to prevent default, it being assumed that there was a contract here for that kind of supervision, or at least that which ordinary prudence in any business would require. Certainly these words may mean that, but not necessarily. They may mean less; for example, they may mean that "due and customary supervision" which obtained in this particular bank, not over all employees, but over the teller, not over all its business in every direction, but only over that which he did. It may mean that which was in vogue when the contract was made or that coming subsequently into use as affording a better mode of detection. If that supervision which it was customary for the authorities of this bank to keep over the teller was careless and ineffective for detection, it would be none the less "due and customary" and that which they took "to prevent default." The point is argued here as if this were a contract for effective supervision; indeed, as if it were a sort of guaranty by the assured that the insurer would not suffer loss because he would take care of him by that kind of effective supervision which would be sure to prevent it, thus reversing the real relation of the parties. And we are told in the proof and in the argument how readily the default could have been detected if other supervision had been given than that which was made. After the fact we can see how easily these frauds could have been prevented if those who were the victims had suspected Schardt and had watched him and

his books instead of relying on his honesty and these policies guaranteeing it.

But all this is beside the question, which is, whether the words of the contract required any other supervision than such as was given. The words of either of the bonds we have quoted are ambiguous and may embrace any degree or acts of supervision from the highest and most certainly effective to those which are least so, as long as they were "customary" or "due." The standard of excellence or efficiency is not definitely mentioned, nor is any rule of custom definitely prescribed whether of this Bank or of all banks, or of any business in which cashiers and tellers are employed. By the rule we have laid down the defendant Company should have been more specific in defining the supervision they required, and the contract should have added, if that was the intention, all due and customary supervision in use in the best-managed banks or generally in use by banks conducted with ordinary prudence and skill, or some words sufficiently designating the general custom now sought to be relied on—if there were at that time any such general custom prevailing in the management of banks; not words applicable to any prudent supervision in many differing ways, but those pointing out a custom of supervision in the particular way now insisted upon. We might rest the point here, but there are facts in the case which indicate quite satisfactorily what was meant by these words.

The defendant Company in its preliminary investigations undertook by examination with written questions and answers to inform itself of the "custom" of this Bank in regard to frequency of inspections, and it was fully informed by the answers of that "custom." It is, in our opinion, in accordance with familiar, general rules of technical interpretation to read these words by the light of that fact and to hold that this was the "due and customary" diligence in supervision referred to in these bonds and provided for by the contracts; and by the particular rule we have already announced, if any more diligent or other customary supervision was embraced it should have been specified by apt words showing that intention. Courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement and

place themselves in the situation of the parties who made the contract, view the circumstances as they viewed them, "so as to judge of the meaning of the words and of the correct application of the language to the thing described." *Goddard* v. *Foster,* 17 Wall., 123, 143. Here on the face of this policy the parties were making these particular inquiries and answers a part of the contract, and presumptively they were referring to these particulars in the phraseology to which naturally they might be applied. "When we have satisfied ourselves," says Mr. Justice Miller, "that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom can not be resorted to for that purpose."

Again, "An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract can not be controlled or varied or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of positive expressions of intentions, to control, vary or contradict the most formal and deliberate written declarations of the parties." *Insurance Co.* v. *Wright,* 1 Wall., 456, 470. Here as there, the argument made goes upon the assumption that all that was indicated by these questions and answers, and which fixes, ascertains, or suggests the kind of supervision in contemplation, is nugatory, and that the whole field is open and the power placed in the hands of one of the parties to dictate the extent of supervision by some other custom, more efficient to have prevented this loss. We think this can not be done.

Precisely the same consideration disposes of the alleged misrepresentation founded on the use of the words "examined" and "verified," as contained in the certificate made previously to the renewal of the teller's bond that his books and accounts as teller had been "examined and found correct," and upon like words as stated in the proposal or statement made on application for the cashier's bond when Schardt was promoted to that employment.

As before, the argument proceeds upon the same assumption that an ordinary, prudent, and careful examination would have developed the stealings that Schardt had covered up. This may or may not be so, for we know that such defaulters are very expert in covering up by false entries and appearances, and often none but the most expert examinations and examiners discover the frauds, and we must, in looking at these certificates, take the appearances as then existing, and not as now uncovered after the discovery by such experts. The defendant Company was competent to pursue such an investigation. It had a manager or agent at Nashville for the purpose of keeping up and procuring information, and was yet contented to rely for reasons we will presently suggest upon these vague and indefinite representations as to that which was done. Now that it appears that the accounts concealed a fraud which close scrutiny behind their face would have developed, we are asked to imply that these words were used to represent that such a close scrutiny had been made in fact, which representation it is argued must have been false, because the frauds were not discovered. This is substantially construing the contract as a guaranty to the defendant Company against the Bank's carelessness in making the examinations or that of its agents. However careless the examination may have been, if made in good faith and the examiners believed the accounts correct, they might truthfully so represent them, albeit they were not correct. The position of the defendant Company leaves no margin here, and holds the Bank to absolute truthfulness, not of the fact of examination made in good faith and a belief in correctness, but of the soundness of Schardt's entries and accounts and their freedom from fraud, no matter how skillfully a fraud may have been concealed by him. The facts do not show any such intentional representation, and the words do not define such a complete assurance. The words "correct" and "verified" may mean that but also less in any degree. One "verifies" an account by merely adding up or doing the other work of mathematical calculation, and finding the figures correct, or by such comparison of entries and items as one may make and find "correct," and any extent of this is "examination," however superficial. These representations do not say that the examination was

skillful or extensive or by comparison of books and trial balances, but only that such examination as was made disclosed no error or fraud, and if this was done in good faith, as there is no doubt it was, it fully meets the representations made unless we are to imply that the parties intended such a thorough examination as would save the insurer harmless, and this, we think, was not contracted for in plain and unambiguous language, as it might have been, if intended. As was remarked by the learned judge at the Circuit, "So long as the Bank officers and the committee acted in good faith, such examination as the appointed committee thought proper and sufficient for the protection of the Bank and its stockholders would satisfy the requirements of this contract as made," and we may add, would be truthfully within these representations. And "if anything more was wanted, it was a matter for specific agreement."

It is to be observed that the inquiries made by the defendant Company did not explore the book-keeping processes of the Bank, nor inquire as to the method employed in the Bank, and yet the defendant urges persistently that any departure from the method in use and any carelessness in book-keeping whereby Schardt was enabled to conceal his frauds is conclusive evidence that the examination and supervision stipulated for was not that which was due and customary, which is to say again that with proper supervision stealing is impossible, and which must come at last to mean that the defendant Company did not, in fact, assure anything. It is also said that Schardt, as part of his scheme to defraud, had ordered certain trial balances to be discontinued, and that they were not taken as they ought to have been, and that by a comparison of different books and original entries and trial balances, the frauds were afterwards and might have been before discerned. It is a sufficient answer to all this to say that these contracts did not specifically bind the bank to this efficient book-keeping, and that it is the common plan of these defaulters to adjust the book-keeping to the service of their concealment — it is the kind of fraud insured against. Schardt had authority or usurped it, to order this discontinuance of trial balances, and it was as much a method of his stealing as the false entries or the putting of the money in his

pocket, and in itself was an act of spoliation like the rest. If it had been the policy of the bank to rely on this vigilance as its sole protection, it would need no bonds or insurance; and if it had been the policy of the insuring Company to protect itself by that eternal vigilance in book-keeping which is the price of safety, it could easily have stipulated for it as a condition of its insurance; not by drag-net generalities to catch any misprisions, but by determinate regulation. It did not do this. And there is a reason for it. If these new companies engaging in this new line of insurance should insist on perfect protection against loss, and demand a stringent, efficient, and unceasing vigilance that would make these frauds next to impossible, they could do no business, and there is no reason why they should exist, or why any one should pay premiums for such limited risks. Business would prefer the old style of bonds, which ask no questions and give a broader indemnity. Hence, these solicitors for the new insurance use these vague, indefinite, ambiguous, and — tested by the implications now demanded — misleading words and phrases that customers may not be deterred by too much visible limitation on the risk; and thus they become what Mr. Circuit Judge Lacombe, in one of the cases we have cited, quoting from the books, calls "a snare for the unwary." The law does not tolerate the spreading of the net nor help it to enmesh its victims.

If we were to concede that the officials of this Bank could not have failed by ordinary prudence to have discovered these frauds, or that without some negligence the losses could have occurred, it would not follow from this that this Company, which has guaranteed to the Bank and its stockholders the fidelity of the teller and cashier, can escape its liability because of such negligence. It has not limited its risk to one arising only when the bank officials act without negligence. If it wishes to do that, it should use apt words in its policy, and say so in plain and unambiguous terms, and then its customers would know that they were paying for insurances against losses that could not occur, for "due and customary" diligence in the sense of the argument we are considering means that kind which always brings discovery the moment the stealing begins. We hold that the proof shows, in respect of this,

that all was done which the contract stipulated should be done, and possibly more, since the policy only stipulated for "an inspection or audit" to be made "at least once in twelve months," and those stipulated to be customary in this Bank were made quarterly, as the insurer was informed; possibly the one enlarges the other, but that point is immaterial, since the greater number of inspections includes the less, and either is thus satisfied.

A separate defense is made on the teller's bond, that it limits the risk to a loss sustained "and discovered during the continuance of the currency of this bond and within six months from the employee ceasing to be in the said service." By manifest misprision of counsel, there is here a misquotation by the insertion of the words "of the currency" after "continuance." Whatever the force of this misprision may be, as the bond is written, it plainly covers any discovery within the next ensuing six months after Schardt had ceased to be teller, provided, of course, the default occurred while the bond was current. The liability on the bond would cover only such thefts as occurred while he was teller under the bond, and when he quit *that* employment, the "said service" would cease. No other service can be meant or applicable to the contract except a service as teller under the bond. If the twelve months of the bond expire and the teller continue in the employment of teller, without a renewal of the bond from this Company, yet, in contemplation of this contract "said service" has ceased, for it means that service which has been insured by this bond and its renewals, and no other service, either as teller or otherwise. That ceases whenever the bond ceases. This relieves the absurdities suggested in the argument based on the misquotation of the bond and a misconception that the discovery must be made while the bond is current; and also prevents the suggested prolongation of the limitation as to time. Whether, if the teller should leave the position of teller so early during the twelve months' duration of the bond that the six months allowed for discovery would expire before the bond itself expired, the time for discovery would, nevertheless by the terms of the bond, continue to the end of the bond, we need not decide. But if he leave so late that the six months' limitation would continue beyond the duration of the bond, we

have not the least doubt that a discovery made within six months from his actual quitting would be within the limitation.

Schardt was elected cashier January 1, 1893. The teller's bond expired January 16, 1893, and the discovery was made in April, 1893. Whether we count the six months from January 1st, or January 16th, seems immaterial, on any facts we know, for either would be within the limitation by a discovery in April next ensuing. If, after his election as cashier, he continued to act as teller, and fraudulently appropriated any money before January 16th, the defendant Company would still be liable, but not for any default as teller after that date. The discovery must have been made within six months from the date, at the very latest, whether he had then quitted the service of teller in fact or not. He had then quitted the service which had been insured, and the bond should read as if it had been written "within six months from the employee's ceasing to be in said service under this bond or its renewals."

Perhaps we should notice that the insuring terms of the bond immediately preceding the above-quoted clause cover defaults "in connection with the duties of said office or position or with any other duties assigned to him by the employer in the said service;" but obviously this does not affect the ruling we have made. It does not enlarge the import of the words "said service" in the limitation clause, as we have construed it. Whether he acts as "teller," strictly so called, or is assigned to "other duties," no matter what, they being all covered by the bond are within the service under the bond, and any acts of any character constitute "said service," but in either clause, as used, these words do not mean the general service as employee at any and all times whatever, but only that general service as an employee of the bank in any kind of duty assigned to the "teller and collector," *during the twelve months covered by the bond* — that twelve months of service being the "said service" meant in either of these stipulations. It might be difficult, under the terms of the bond, to start the running of the six months by any "ceasing of said service," while the employee remained at work in the bank in any capacity, because of the very broad insurance of all duties assigned to him; and pos-

sibly all that the defendant Company can certainly claim under the words the Company itself has chosen to define the limitation for its protection, as applied to the facts of this case, and to them we confine our judgment, is that the six months shall commence not later than the expiration of the bond, and they shall be bound for no discoveries after six months from that date. Again, it is obvious that, under the rules of interpretation we have been applying in this case, that it was the duty of the insured, by plain and unambiguous words, to have fixed any other limitation it intended than this which is most favorable to the assured on the words that are used, and most consistent with the general purpose both parties had in view, namely, to protect twelve months of the service of Schardt in this Bank, giving a reasonable time for terminating that liability by a limitation fixed by the contract, and not depending on the ordinary statute of limitations based on public policy, and measuring that limitation of time from the discovery of the frauds, and not from the date of their commission and concealment of the fact. On the one hand, it might be unreasonable to so construe the words "ceasing to be in said service," as to include a service after the bond had expired, thereby prolonging the limitation on discovery indefinitely in its relation to the termination of the twelve months covered by the bond; and on the other, to so construe the words, "discovered during the continuance of this bond and within six months from ceasing to be in said service," as including only a discovery within the twelve months, thereby cutting off any possible liability for a fraud committed within the last minute of the duration of the bond, or so late as to furnish no time for investigation; but it is an entirely reasonable construction which, consistently with the words, avoids either of these extremes, and fairly requires the assured at the very latest to find the frauds within six months from the termination of the bond. Counsel for the plaintiff denounce these perplexing stipulations as designed to mislead, and they are clearly not definite, open, and unequivocal, as they should be, to express a distinct purpose; but we may point to the fact that our construction is analogous to similar provisions in the ordinary contracts of insurance, and conforms to similar stipulations of this very contract, giving three months for discovery

after cancellation, and to one of the cashier's bond terminating the liability within three calendar months from "the expiring of this bond."

The next defense to be considered is that relating to the "bucket shop speculations" of Schardt, as it is designated in argument. It applies to both bonds, but in a somewhat different form. The language of the condition in the teller's bond is that of a stipulation to notify the insurer of such conduct, and that of the cashier's bond is a representation, or, rather, the defense is that of the misrepresentation of a fact.

It is somewhat difficult, without displaying all the proof with a commentary on the credibility of the witnesses and their opportunities of knowledge, to exhibit the fullest justification of our impression that this defense rests on circumstances comparatively inconsequential, which have become formidable only because of the subsequent developments of Schardt's vast gambling in exchanges called futures, the knowledge of which he concealed from all who were interested, including the agent of the defendant Company, who was one of the community where these transactions took place, and who was there to watch the "habits and associations" of customers of defendant Company, like Schardt, but we can not take the space here to do this, and, therefore, forego it. There is no proof that Schardt ever confessed to speculation or gambling, except that of Sykes, who is somewhat discredited because he has a litigation with the Bank, and an apparent animosity toward it. He is also quite indefinite as to time and circumstances, and does not impress us with the certainty of his recollection, although he uses the language of positive statement. He may confuse what Schardt did admit with what he thus testifies as to his admissions. All the witnesses were speaking about long past circumstances which evidently did not make a serious impression commensurate with that importance which these circumstances now assume in the light of Schardt's defalcations. Sykes recommended him to be cashier in succession to himself and asked for renewals of his bond and evidently, if he be an honest man, these admissions and circumstances did not affect his own belief in Schardt's freedom from serious objection in this employment.

There is not the least evidence of any bad faith on the part of any of these officers of the Bank, including Sykes, the old cashier, in not making a disclosure of what was known, but only of bad judgment in not being more considerably affected by their information.

It may be conceded that it was negligence on the part of the officials of this Bank when they first heard of what they did hear and knew what they did know, not to investigate Schardt's books and accounts with the most rigid scrutiny; and not to have immediately discharged him, unless such an investigation should justify his retention, may have made them and the Bank liable to those of their customers who suffered by him; and that to be a broker for those who speculate and gamble even in so small a way as Schardt confessed that he was a broker, or to be a partner of such a broker, or to be interested in a "bucket shop" if we please, in any way as a broker or customer, is for all bank employees a discrediting "habit and association." We agree to all that is said about this in the cases cited, *Preston* v. *Prather*, 137 U. S., 604; *Prather* v. *Kearn*, 29 Fed. Rep., 498; *Scott* v. *Chester Valley Nat. Bank*, 72 Pa., 479. But this defendant company had not contracted for such a guaranty against negligence as had the depositors and bailees who sustained an action of damages in those cases, and this suggested analogy is neither a legal nor a fair test of the contract duty of the Bank to its insurer against Schardt's dishonesty in the premises. Here again it must be strictly limited to the words it has used in defining that duty, and none is owed beyond the words by any kind of implications energized by any indignation at the negligence of the Bank in not protecting itself, or indignation at the immoral conduct of Schardt. This insurer was insuring the Bank for its protection in just such emergencies and against just such negligence, unless the words of this policy speak to the contrary, and had received the consideration for it, while the depositors of the Bank, in the cases cited, had contracted for either common prudence, ordinary vigilance, or against gross negligence. It is a reversion of the attitude we have here, and it is a perversion of that principle to apply it here.

If Sykes ever told Baxter, the president, that Schardt had admitted in 1892 that he had been speculating in a small way but

had stopped it, as the learned judge at the circuit remarks, that was "a past event;" and as by the same story he had stopped it, the president may have thought it in itself unimportant and dismissed it as the cashier, Sykes, himself did. It may have been gross negligence to the depositors of the Bank to so treat the information; but as he was not then "engaged in speculation or gambling" (according to the information, but not according to the stupendous fact as we now know it), or was not then "indulging in any disreputable habits or pursuits"—if these words apply to "gambling" habits that before were so fully provided for by the stipulation, which may be doubtful—there was no obligation under the stipulation of the teller's bond to report it to defendant Company, whatever may be thought of the obligation to protect the Bank in the future by investigating Schardt and discharging him as a duty to depositors, who otherwise might sue for negligence. If that which was told was as Eatherly states it, that Schardt had put $200 in the bucket shop as one of the partners or stockholders, that was not "speculation or gambling" or engaging in it, in a strict construction such as we must make here, but only being the agent of those who were speculating and gambling; it may be considered a "disreputable" habit or pursuit, but however regarded, and whether it be broadly and liberally interpreted as "gambling" or not, it was, too, "a past event" when the Bank became "aware" of it and the habit had been abandoned—again, according to the information, but not the fact, unfortunately for all concerned.

If, also, that which Sykes tells, was told to Baxter, the president, it is to be now considered in its relation to the representation made preliminary to the cashier's bond. We have an impression that Sykes is mistaken and confuses or enlarges what was known and done after the anonymous letter, but take it as he tells it, and it does not appear that Baxter in bad faith withheld the information. He was answering "to the best of his knowledge and belief," and the warranty is not absolute with such a limitation and can not be, necessarily. If in good faith he did not believe what he heard to be "unfavorable" because Schardt had ceased to deal in the "bucket-shop," or in like good faith did not "deem it advisable" that the insuring company should make inquiry, surely his

answer was true, because he is made the judge of what is "unfavorable" or what was "advisable," at least within the limits of what reasonable men might think about it. Moreover, it is to be observed that unlike that which appears in the teller's bond, which we have just considered, no mention is made of "gambling" or "speculation" in this question. It is "habits or associations," past or present, that are called to mind, and we doubt if "dealing in futures" had come to be considered "gambling" in that "plain, ordinary, and popular sense" of which Mr. Justice Jackson has spoken in the quotation we have made; so as to bring it within the common thought expressed in "habits and associations," as gambling at cards, for instance, surely would be; or if "speculation" had come to be considered "unfavorable." A bank president surely should know that "dealing in futures" was unfavorable, but *non constat* that a single dealing, or small and insignificant dealing which had ceased, was "a habit;" or that it was advisable for the insurer to inquire about it if it had ceased, and he was informed it had. If the information he got was as Fatherly described it, going only to show that Schardt had been a partner in the brokerage agency, then what we have said about the other applies with greater force. Possibly a reasonable man might limit this inquiry to such "habits and associations" and "matters" as the moralists ordinarily condemn as involving turpitude, or as disgraceful and opprobrious, and not include the business sin of wasting one's own money in speculative trading, even in a "bucket shop." If the money be one's own and not fiduciary money, as to which there was no information, it is still ordinarily by those not casuists regarded as more excusable than the common games of chance. At all events, any indefiniteness or uncertainty of language used is to be resolved in favor of the assured and against the insurer, and certainly this "warranty," whatever force it has, leaves the quality of being "unfavorable" or "advisable" to some kind of construction by the mind of him who is answering the question. It is not precisely within the rulings in *Insurance Co.* v. *Gridley*, 100 U. S., 614, nor *National Bank* v. *Ins. Company*, 95 U. S., 673, because it does not depend wholly on the knowledge of the facts, as there, but is a representation as to what has been "heard" by the one an-

swering. Yet, considering the subject-matter, the principle decided is analogous, since the respondent is left to exercise his own judgment about what he has heard, and there is no warranty that that judgment shall be of the best or an absolutely correct judgment, and that is what we are asked to include within the warranty by this defense.

On the authority of *Moulor* v. *Insurance Company*, 111 U. S., 341, and *Insurance Company* v. *Raddin*, 120 U. S., 183, the learned judge at the circuit doubted whether under the strict rule this contract should be taken as a warranty, but did not decide that point, as we do not, since we find that being treated as a warranty, there has been, when properly construed, no breach of it. Baxter, the president of the Bank, had heard what we can now see was unfavorable, and that it would have been advisable for the Company to inquire about it, but under the then circumstances it can not be said that he reasonably should have known that it was unfavorable or advisable to make inquiry, and this was left to his determination by the contract. This was a limitation on the warranty itself and lessened its scope otherwise. We may add to what the learned trial judge said that under the rulings in *Penn. Life Ins. Co.* v. *Mechanics' Bank*, 72 Fed. Rep., 413, the strict rule as to disclosures which have been imported from the marine insurance law and which statutes so often have abrogated as unjust, should not be extended to these new policies, and on this ground all the courts have held that the warranties shall be strictly construed, as we do this.

After the anonymous letter was received and Schardt had been called before the Bank officials, and denying the charge that he had been speculating, had produced witnesses to disprove it, there may have been rumors afloat, as the witnesses testify, perhaps all traceable to that source, but there was no duty on the Bank to run down this kind of information or to report it. It had not assumed the business of a detective agency by the contract. It was held in *American Surety Company* v. *Pauly*, 72 Fed. Rep., 470, 476, under a policy similar to this, but under another clause, which is also found in this, requiring notice in writing of any act which may involve a loss coming to the knowledge of the employer, that

"knowledge" and "suspicion" are not synonymous terms, that the bond does not call for notice of suspicions, but only of a knowledge of some specific fraudulent or dishonest act. The same rule is applicable to the disclosure required under the clause we have in hand so far as it calls for "knowledge" and to the clause in the teller's bond requiring notice on "becoming aware" of speculation and gambling. Mere rumors and suspicions are not included certainly in the teller's bond, and, for the reasons we have indicated, we think not in the other, although it is broader in requiring notice of things "heard" as well as things known. It is not everything heard that is required to be told, but only unfavorable habits and associations or matters important enough for inquiry. We have already stated why these are not included, and the proof shows nothing more formidable than what we considered in that connection. In the case of the *Supreme Council Catholic Knights* v. *Fidelity & Casualty Co.*, before cited, 63 Fed. Rep., 48, 57, the contract could not be affected by loose parol statements or concealment of facts, about which no inquiry was made, or by conduct upon which no reliance was placed, but only by misrepresentation or fraudulent concealment provided against as a part of the agreement. Everywhere this rule is found, that it is open to the insurer to be specific and therefore mere entrapping generalities will not be tolerated.

Objection is made to an item included in the report of the expert bank examiners on which the decree was rendered, of $5,992.35 of "overdrafts allowed and not authorized." It is insisted that this was not embezzlement or larceny. We do not know whether it was or not. It might be, because embezzlement or larceny may be committed through the process of overdrafts. This question was not made by exceptions or passed on in the Circuit Court and was, it is said by counsel, only brought to attention there at the time the decree was entered. It is evidently an afterthought, and there being no proof showing the facts in relation to the overdrafts nor why they were by the examiners included, neither the trial court nor this Court can say they were not embezzlements or larcenies. There is no proof to sustain this objection, which comes too late.

Nei her do we see any objection to the interest allowed. It is urged that it does not appear that the Bank could have made six per cent on the lost money if it had not been stolen, since it did not discover the thefts until 1893, and that the only basis for adding interest is to make good the loss of the use of the money in the meantime. This is a mistaken view of the law of interest. The Tennessee Code allows interest on bonds. Tenn. Code (M. & V. ed.), sec. 2702. If a policy of insurance be not included in this statutory allowance when it takes the form of a bond, as this does, it may be allowed by the jury or the chancellor as "damages" for money detained. Here the defendant Company agreed to make good the loss sustained by the fraudulent acts of the employee, and if Schardt had been sued the jury or chancellor could have allowed interest against him as part of the damages or "loss" and this the defendant Company assured. Interest should be allowed from the date of embezzlements, or from the end of each year, if the jury or the chancellor choose, as he did here, to the filing of the proof of loss, up to the penalty of the bond but not beyond it, of course. Then on this amount there could be no interest for three months, since that sum is not due by the terms of the contract until three months after filing proof of loss. But if not then paid it bears interest as a debt due from that date, if allowed by the jury or chancellor, when not given by statute. We think it should be allowed in this case, whether given by statute or not. Being allowed, it should be calculated to the date of the decree, as in other cases. It will be so allowed here.

On the whole, we are satisfied with the decree of the Circuit Court and with the reasons given for it as found in the record and reported *sub nomine, Mechanics' Savings Bank* v. *Guarantee Company*, 68 Fed. Rep., 459, and it will be affirmed.